IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:06.09.2006

CORAM

THE HONOURABLE MR.JUSTICE J.A.K.SAMPATHKUMAR

A.S. No.471 of 1993

M/s.Kerala Transport Co.,
Fleet Owners & Cargo Movers,
Coimbatore. ... Appellant/Defendant.

-Versus-

1.M/s.Universal Radiators Ltd.
by their Power of Attorney
M/s.United India Insurance
Co.Ltd., Coimbatore.

2.M/s.United India Insurance
Co.Ltd. Coimbatore. ... Respondents/Plaintiff.

Appeal suit filed under Section 96 of Civil Procedure Code against the judgement and decree dated 23.3.1993 made in O.S.No.78 of 1987 on the file of the III Additional Subordinate Judge, Coimbatore.

For Appellant : Mr.A.K.Venkatesan
For Respondents : Mr.M.B.Gopalan

JUDGEMENT

The appeal is filed against the judgement and decree dated 23.03.1993 in O.S.No.78 of 1987 on the file of the III Additional Subordinate Judge, Coimbatore in and by which the learned III Additional Subordinate Judge after perusing the evidence in depth found that the 2nd plaintiff is entitled for the suit claim and accordingly decreed the suit. For convenience, the parties are referred as arrayed in the original suit.

2.Brief facts of the case are as follows:

The Ist Plaintiff M/s. Universal Radiators Ltd., Coimbatore has ordered under order No.UR 239,330 dated 10.7.1985 for 37.000 MT. Of 63/378. Alloy Brass Foil of 0.14 m.m. x 33 m.m. and 18.500 M.T. 0.12 mm x 33 mm with M/s.E.Sadoshima & Co. Ltd., Osaka, Japan. The Ist plaintiff has purchased these Brass Foils for the manufacture of Automobile Radiator Tubes. These Brass Foils are imported specially to manufacture radiators, to supply to defence, and to fulfil export commitments to various

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countries.

3.The Ist plaintiff's suppliers M/s.T.Sadoshima & Co. Ltd., Osaka, Japan, immediately shipped the suit consignment by POSTOJNA from Koba, Japan Port to Coimbatore via Madras Port B/L No.1082328 with the marks and Nos. of 'Universal, Coimbatore. The said unit consignment were 946 coils and packed in 73 cases. The Ist plaintiff's Agent at Madras viz. M/s. Nirmal Sea Freight (P) Ltd., had received the suit consignment at Madras in tact on 20.8.1985. After landing at Madras, the Ist plaintiff's agents at Madras entrusted the suit consignments with the defendant at Madras for transport and delivery to the Ist plaintiff at Coimbatore under four different lorry receipts namely:

L.R.No.	Date	No. Of cases
1.1347962	30.8.1985	18 cases
2.1347965	30.8.1985	18 cases
3.1347963	30.8.1985	18 cases
4.1347964	30.8.1985	18 cases

4.The first plaintiff's agent at Madras is the consignor and the Ist plaintiff is the consignee under the aforesaid Lorry receipts. The plaintiffs have produced the invoice containing the description of goods and other relative particulars. The original lorry receipt relating to the suit consignments have been handed over to the defendant at the time of taking delivery of the suit consignments.

5.When the suit consignment arrived at Coimbtore on 31.8.1985 and 2.9.1985 out of 73 wooden cases entrusted for transport, the defendant has delivered 23 wooden cases in broken condition and the inner contents coils were damaged. An aggregate total of 11,893.2 kgs. of coil were damaged. On account of damages, the Foils have got to be recoiled by re-rolling under pressure rollers by a special Machine at different stages to make the coil suitable for the manufacture of cores or tubes to use in Radiators. After noticing damages to the suit consignment, the Ist plaintiff immediately claimed the defendant to issue certificate of damage in token of having delivered 23 wooden cases in broken condition, but the defendant refused to issue any such certificate. The damages to the suit consignments are due to the negligence of the defendant in handling and transport. The damages to the suit consignments having been caused by the negligence of the defendant, they are therefore liable to pay the labour charges for recoiling and re-rolling.

6.Upon receipt of information of the damages to the suit consignment, the plaintiffs immediately deputed an independent and qualified surveyor by name Shri.G.R.Raj of Coimbatore, to inspect, survey and assess the loss. The said surveyor conducted an open survey and submitted his report dated 5.1.1986.

7.Since the suit consignments were insured with the 2nd plaintiff against loss/damage in transit under 2nd plaintiff's Marine Policy

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No.090202/335/81/1/00344/85,the Ist plaintiff recovered a sum of Rs.46,989/- being the labour charges of recoiling and re-rolling 11.898 kgs. Bross Foils from the 2nd plaintiff and has executed a letter of Subrogation and Special Power of Attorney, entitling the 2nd plaintiff to recover the aforesaid loss. In the circumstances and in its capacity as Subroges, the 2nd plaintiff alone is entitled to the aforesaid sum under law and sue for the recovery of the same. Hence the suit.

8.The defendant states as follows:

It is true that a consignment of 73 cases containing brass foils were transported by the defendant carried from Madras to Coimbatore as per the Lorry Receipts. The first plaintiff's agent, M/s.Nirmal Sea freight (P) Ltd., did not send the consignment. The Assistant Collector of customs alone was consignor as per the goods forwarding notes. The consignment was actually sent from Madras to Coimbatore and both the consignor and consignee were the Assistant Collectors, Customs.

9.The consignment was booked only on 30.8.1985 on producing goods forwarding notes prepared and signed by the consignor. While entrusting the cases to the defendant carrier, 4 separate goods forwarding notes were prepared by the consignor and only on the basis of the said goods forwarding notes, the way bills were prepared. A mere perusal of the goods forwarding notes prepared by the consignor will clearly show that out of 73 cases entrusted to the defendant 18 cases were broken condition. At the time of the entrustment of the said goods either the consignor or the carriers were not in a position to know the actual condition of the brass foils inside the said cases.

10.The trucks loaded with the consignment were taken directly to the warehouse of the consignee and the consignee took delivery of the same without any protest. The delivery was effected in the presence of the consignee and no open delivery certificate was issued by the defendant at the time of effecting the said delivery of the goods. The consignment was delivered to the consignee in the same condition in which it was delivered to the defendant at Madras by the consignor. If there was any damage to the consignment at the time of the transit, the consignee would have reported the matter to the defendant. No complaint of any kind was sent by the consignee, immediately after delivery.

11.There was no negligence of any kind on the part of the defendant in handling the consignment, at the time of transporting the same from Madras to Coimbatore. Since there was no negligence on the part of the defendant, no question of liability arises regarding damages to brass foils. The defendant has not issued any open delivery certificate at the time of delivery of the consignment without which no claim is admissible.

12.The defendant was not informed of the inspection of the consignment by the qualified surveyor by name Sri.G.R.Raj of Coimbatore. The defendant does not know anything about the survey conducted by the said Raj and the

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report submitted by him. The unilateral survey report therefore is not binding on the defendant. The consignment is said to be imported from Japan and therefore either the consignor or the consignee had no occasion to know the condition of the consignment at the time of entrusting the same to the defendant at Madras.

13.The consignment was carried in four trucks, loading being done under the direct supervision of the warehouse people. Unloading was done by the consignee himself. The carriers have not handled the consignment at any stage.

14.Under the said circumstances, the carriers are not liable to pay any damages to the plaintiff even if there is any damage to the consignment. Hence the suit is liable to be dismissed.

15.Two witnesses were examined and Exs.A1 to A16 were marked on the side of the plaintiffs to prove their case. One witness was examined and Exs.B1 to B4 were marked on the side of the defendant to disprove the claim of the plaintiffs.

16.The lower court after analysing the evidences in depth found that the 2nd plaintiff is entitled for the suit claim and accordingly decreed the suit.

17.The present appeal has been filed against such findings.

18.The learned counsel Mr.A.K.Venkatesan argued for the appellants and the learned counsel Mr.M.B.Gopalan argued for the respondent.

19.Upon hearing the rival contentions of the learned counsel for appellants and respondent the only point for consideration is:

Whether the defendant being a carrier delivered the goods in a damaged condition as stated by the plaintiffs?

20.It is true that the defendant was entrusted the goods referred in the suit to transport from Madras to Coimbatore and to deliver the same to the first plaintiff. The said goods were sent to the plaintiff as per consignment dated 30.8.1985. The consignment consists of four packages each package consists of 8 cases. The consignments were sent by different lorry receipts namely:

L.R.No.	Date	No. of cases
1.1347962	30.8.1985	18 cases
2.1347965	30.8.1985	18 cases
3.1347963	30.8.1985	18 cases
4.1347964	30.8.1985	18 cases

The lorry receipts were marked as Ex.A13 to A16. Ex.B1 to B4 were in possession of defendant. Ex.A1 to A4 are related to the purchase of the consignment from S M/s.T.Sadoshima & Co. Ltd., Osaka, Japan. The cases were delivered to the first plaintiff on 31.8.1985 and immediately after

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opening of the packages they found certain damages to the goods.

21.On 2.9.1985 the plaintiff called upon the defendant to issue damage certificate as the defendant delivered the goods in a damaged condition to the first plaintiff. The letter was marked as Ex.A5. He has also informed through Ex.A5 that he arranged insurance survey to assess the damage caused to the goods during transit for which only on 27.9.1985 the defendant replied disowning his liability. The letter was marked as Ex.A6. The fact of arranging insurance surveyor to assess the damage was informed by the first plaintiff to the defendant to assess the alleged damage sustained during transit. Ex.A7 is the surveyor report submitted by the surveyor engaged by the plaintiff. He assessed the damage caused to the goods and quantified the same. The surveyor came to the conclusion that during the time of transit the consignment should have sustained damages. This aspect is very clear in his report. Since the defendant does not admit his liability the second plaintiff being an insurer of the goods reimbursed the damages caused to the first plaintiff and for which the first plaintiff given a letter of subrogation. The first plaintiff has also received money for the same. Ex.A10 to A12 are the proof to that effect.

22.The learned counsel for the appellants contended that 18 cases were found damaged at the time of loading. It was done in the presence of plaintiff agent and that damages to the goods was due to breakage of the cases and as such the defendant is not liable to pay any amount to the plaintiff. He has also relied on Ex.A13 to A16 in support of his contention. No doubt there is reference in Ex.B1 to B4 about the breakage of planks in and about 18 cases. But the same not find a place in Exs.A3 to A6.

23.It is worthy to note that the defendant failed to produce acknowledgement of delivery of goods to the plaintiff to show that he delivered the goods to the plaintiff only in damaged conditions due to breakage of planks of 18 cases. The said acknowledgement receipt is with the defendant only. If really the defendant delivered the goods in damaged condition due to breakage of plank in 18 cases for which he is not responsible, could have insisted the plaintiff to make endorsement for the same and obtained acknowledgement to show that he is not responsible for such damage. Even otherwise after the receipt of Ex.A5 from the plaintiff the defendant ought to have taken steps by engaging a surveyor independently to assess the alleged damages and place the same before the plaintiff to quantify the damages. He had not done so.

24.In fact he has sent a reply under Ex.A5 only on 27.9.1985 as per Ex.A6. It appears from the conduct of the defendant in sending belated reply that he has considered the transaction very lightly without looking into the seriousness of the same. As per Sections 6 and 8 of the Contract Act it is not necessary for the consignee to prove negligent act of the carrier for the damage caused to the consignment. It is only for the

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carrier to establish that the damages caused to the goods was not due to his negligence. It is a well settled law that it is not necessary for the surveyor to issue notice to the carrier independently before assessing the damages caused to the consignment. In fact through Ex.A5 the plaintiff has informed the defendant about the appointment of the surveyor to assess the damages sustained to the goods during transit. If the carrier failed to employ any surveyor for assessing the damage on his own and failed to prove the damage was not due to his negligence, he cannot challenge the surveyor report filed by the plaintiff. The surveyor has filed his report and his report should be accepted.

25.The letter of subrogation is also binding in the carrier. The decision reported in 2004 (4) CTC 103 (Bond Food Products Private Ltd. Registered Office at No.80, 4thl Block, Koramangala, Bangalore 560 034 and another Vs. M/s. Planters Airways Ltd., 13/5, Kalasipalayam, New Extension I Floor, Bangalore.) laid down the principle supportive to the above proposition. The principle laid down in 2000(III) CTC 59 (Patel Roadways Ltd. vs. Birla Ylamaha Ltd.) would also establish that the common carrier is responsible for the safety of goods given to him in all events except where loss or injury arises solely from Acts of God. Failure on the part of carrier to deliver goods safely is breach of duty placed upon him by common law.

26.From the the principles laid down in the said decisions coupled with the facts on hand. I am satisfied that the 2nd plaintiff is entitled to the suit claim. The lower court also, dealt this point in that line and rightly came to the conclusion that the 2nd plaintiff is entitled for suit claim and accordingly decreed the suit.

27.I do not find any error or illegal in the findings of the lower court. The finding of the lower court does not require any interference.

28.In the result, the appeal fails. Accordingly the appeal is dismissed with costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To
The III Additional Subordinate Judge,
Coimbatore.
+ 1 CC To Mr. M.B.Gopalan, Advocate SR NO.41382

+ 1 CC To Mr. N.S.Varadachari, Advocate SR NO. 40907

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